quit dated 4th Apirl, 1972. In the circumstances, it was submitted it cannot be said that he was in arrear of rent until a lawful demand for payment is made and the fourteen days' period for the purposes of the Control of Rent Act can only be said to run as from that date. In my view a perusal of the series of correspondence between the solicitors of the parties concerned shows a different story. It is clear that prior to the written undertaking in Ex. P7, the appellant was well aware of the existence both by agreement and established practice over many years of the rents having been paid at the office of Messrs. Cooper Brothers & Co., Chartered Bank Chambers, Penang. (See Ex. P4). That was not denied by the appellant in subsequent correspondence. In fact the appellant through his solicitors agreed to forward all rentals in the future to the respondent's agents in Penang. (See Ex. P5). Subsequently on 29th April, 1971, the appellant through his solicitors gave a written undertaking to pay all future rents punctually. In the circumstances the question as to the demand of rents by the landlord or her agent should not have arisen at all. I think it was in this regard the magistrate referred to when he said the respondent/landlord would have commenced action for possession way back in 1971 on the strength of the first notice to quit (Ex. P2) but like a good and reasonable landlord she gave him another chance after receiving fresh assurance from the appellant/tenant. That answers the second and third grounds of this appeal.

The fourth ground states, *inter alia*, that in considering reasonableness under section 16(3) the learned magistrate should have considered that the premises were being run as a coffee shop and the making of an absolute order for possession would cause the appellant considerable hardship and loss of goodwill in business apart from there being no availability of alternative premises for him to reside or carry on business. I agree with the submission of Mr. Chandran for the respondent in that no evidence whatsoever was adduced by the appellant at the trial as regards the facts and circumstances surrounding the issue raised apart from the fact that the appellant was running a coffee shop. Thus, without going into any legal implication involved, I am of the opinion that there was no sufficient nor reasonable grounds for the learned magistrate to have considered them and I do not consider that this ground holds water at this stage. The question of reasonableness depends on the facts and circumstances adduced by evidence during the proceeding.

Considering the available evidence in this case, I hold that the learned magistrate came to the right conclusion that the appellant has a bad record and acted on the principles propounded in *Dellenty* v. *Pellow, supra*. There was sufficient evidence for him to come to the conclusion that it was a case in which it would be reasonable to make an absolute order for possession although the rent was actually paid into court before judgment. This is not a case of mere inadvertence but of a deliberate omission on the part of the appellant.

The appeal is therefore dismissed with costs.

Appeal dismissed.

PUBLIC PROSECUTOR v. LAI AH BEE

[A.Cr.J. (Chang Min Tat J.) May 30, 1974]
[Penang — Criminal Appeal No. 25 of 1974]

Dangerous Drugs Ordinance, 1952, ss. 12(2) and 37(b)(d) and (g) — Presumption under — Possession not established by evidence — Whether various presumptions raised — Custody and control — Knowledge.

The accused was in a room in a house under the raised platform floor of which were found 3 tins of opium lying on the ground. Access to the location of the tins was from outside the house by crawling under the house. This was an appeal by the Public Prosecutor against an order of acquittal and discharge in the lower court where the respondent had been charged under section 12(2) of the Dangerous Drugs Ordinance 1952. The Public Prosecutor contended on appeal that the accused was the occupier of the premises. Reliance was placed on three presumptions contained in the Ordinance viz. section 37(b), (d) and (g).

Held: (1) mere presence in one of the two rooms of the house without more did not show that she had or appeared to have the care or management of the house and the presumption that she was the occupier could not be raised;

(2) where the possession is not established by evidence, the prosecution has to prove that the accused had in her custody or under her control (the drug) before she could be deemed until the contrary be proved to be in possession of the drug and to know the nature of the contents. In this case as the three tins were found under the floor boards and access was possible only from outside, the prosecution did not raise the presumption;

(3) knowledge by itself that the drug was concealed in the premises was not sufficient to fasten possession on the accused. It was only one of the ingredients of possession.

Cases referred to:-

(1) *Leow Nghee Lim* v. *R.* [1956] M.L.J. 28.
(2) *Public Prosecutor* v. *Ong Chang Sow* [1954] M.L.J. 82.

CRIMINAL APPEAL.

T. Selventhiranathan (Deputy Public Prosecutor) for the appellant.

C. V. Prabhakaran for the respondent.

Chang Min Tat J.: On 6 August 1973 at 11.20 a.m. a police party raided premises No. 2943 Jalan Raja Uda, Butterworth. At that time, the accused and a girl carrying a child were in the house. The accused was in a room just opposite the kitchen. The girl with the child was in the kitchen.

The police found nothing incriminating inside the room. But one officer was astute enough as to raise a mat covering part of the floor, which was a raised platform. Through the holes in the floor, this officer saw 3 tins lying on the ground. The tins however could not be recovered from the room. An officer had to go outside and crawl under the platform before he could recover the 3 tins.

Inside the 3 tins were 19 tubes, some of which contained heroin, of a total weight of 3.919 grammes.

The accused was charged with the offence of possession under section 12(2) of the Dangerous Drugs Ordinance No. 36 of 1952.

It was apparent at the trial that the prosecution relied on the various presumptions under the Ordinance. The first was section 37(b) which reads —

"(b) Any person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has or appears to have, the care or management of such premises."

At the close of the case for the prosecution, learned defence counsel submitted that until and unless the prosecution had adduced some evidence of care and management on the part of the accused, the presumption could not and should not be raised. He cited Taylor J. in *Leow Nghee Lim* v. *Reg.*[1] at page 29.

"The onus is on the prosecution to adduce convincing evidence of the facts necessary to raise a presumption before the onus on any issue is shifted."

Defence counsel said there was no such evidence.

The learned President Sessions Court agreed with this submission and acquitted and discharged the accused without calling for her defence.

The Deputy Public Prosecutor now appeals. He contends that the accused was the occupier of the premises.

With every respect, it seems to me that her mere presence in one of the two rooms of the house without more does not show that she had or appeared to have the care or management of the house and the presumption that she was the occupier could not be raised. Evidence was freely available of her address and her relationship, if any, to the other occupants and in particular the tenant of the house. Such evidence was not called to show what care or management she had and if any presumption has to be drawn, it must be against the prosecution.

But there are other difficulties in maintaining that the prosecution has raised a *prima facie* case against her. Even if she was presumed to be the occupier, the question still is whether there is any proof in the prosecution case or any presumption which the prosecution can rely on, until the contrary is proved, that she was in possession of the drug. The learned Deputy Public Prosecutor frankly admits that the prosecution must rely on two other presumptions in the Ordinance. They are:

"section 37(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;"

and

"(g) if any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises;"

Compare section 3(2) of the Opium and Chandu Proclamation which read:

"Any opium or chandu which is found on any part of any premises shall be deemed, unless the contrary be proved, to be in the possession of the occupier of such part of the premises."

and which the Dangerous Drugs Ordinance of 1952 repealed.

In reply to my question, the learned Deputy Public Prosecutor relied on *Public Prosecutor* v. *Ong Chang Sow*[2] which dealt with the presumption under section 37(d).

The facts in *Ong Chang Sow's* case were that the accused was found in a room with a number of utensils for the smoking of opium and a box containing opium. The key to the box was with a neighbour. Thomson J. held that on the charge of possession, the accused had a case to answer. In his view,

"on the facts in the present case, it is clear that once the locked box containing the opium was found in the possession of the respondent, he was until the contrary was proved to be deemed to have been in possession of its contents and to have known the nature of these contents."

Now an extension of this dictum, with which I am with respect in total agreement, must, where the possession is not established by evidence, read that the prosecution has to prove that the accused had in her custody or under her control the 3 tins containing the heroin, before she could be deemed until the contrary be proved to be in possession of the drug and to know the nature of the contents.

On the facts of the instant case that the 3 tins were found under the floor board and access was possible only from the outside, I do not, with respect, consider that the prosecution in this case had raised the presumption under section 37(d), of possession and knowledge.

As for section 37(g), even if it is conceded that the tins were concealed in the premises, all that could be raised is the presumption that the occupier knew the concealment of the drug. But it is clear that knowledge by itself is not sufficient to fasten possession on the accused. It is only one of the ingredients of possession. Taylor J. in *Leow Nghee Lim's* case, *supra*, questioned the correctness of the proposition that if the opium was concealed in the drawer with the knowledge of the accused, it followed that he had custody of it.

A *prima facie* case against the accused in this case given the presumption that she was the occupier could perhaps be said to be raised if the presumption was in the words of section 3(2) of the Opium and Chandu Proclamation, but the various presumptions in the Dangerous Drugs Ordinance even taken together do not on the facts of this case raise the presumption of possession with which she was charged but only, if at all, that she had knowledge of the concealment.

It may be that there is a lacuna in the presumptions enacted in the Ordinance. On the other hand, it may be the deliberate intention of the Legislature in its wisdom to require proof of custody or control before the presumption of possession is raised. Having regard to the fact that section 37 is a re-enactment in another form of section 3 of the Opium and Chandu Proclamation, I am inclined to the view that there is no lacuna.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Gurdev Singh & Co.*